# In the Supreme Court of the United States

OCTOBER TERM, 1970

No.

UNITED STATES OF AMERICA, APPELLANT

*v.*

GEORGE JOSEPH ORITO

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN*

## JURISDICTIONAL STATEMENT

### OPINION BELOW

The decision and order of the district court (Appendix A) is not yet reported.

### JURISDICTION

On October 28, 1970, the United States District Court for the Eastern District of Wisconsin entered its decision and order (Appendix A) dismissing a one-count indictment based on 18 U.S.C. 1462, which prohibits the interstate transportation of obscene material by common carrier. The court dismissed the indictment on the ground that Section 1462 is overbroad on its face because it unconstitutionally extends the prohibition on interstate transportation of obscene ma-



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terials to those intended solely for privvate use (Appendix A, *infra*, p. 14). A notice of appeal to this Court was filed in the district court on October 29, 1970 (Appendix B, *infra*, p. 15). This Court has jurisdiction under 18 U.S.C. 3731 to review on direct appeal from a district court the dismissal of an indictment based upon the invalidity of the statute on which the indictment is founded. See, *e.g.*, *United States* v. *Spector*, 343 U.S. 169; *United States* v. *Petrillo*, 332 U.S. 1.[1]

## QUESTIONS PRESENTED

1. Whether 18 U.S.C. 1462, which prohibits the interstate transportation by common carrier of obscene material irrespective of its intended use, is constitutional.

2. Whether, assuming that only transportation of obscenity for non-private purposes may be prohibited, the district court erred by considering a challenge to the statute on its face.

## STATUTE INVOLVED

18 U.S.C. 1462 provides in pertinent part:

> Whoever brings into the United States, or any place subject to the jurisdiction thereof, or knowingly uses any express company or other common carrier, for carriage in interstate or foreign commerce—
>
> (a) any obscene, lewd, lascivious, or filthy book, pamphlet, picture, motion-picture film,

[1] The recent amendment to this section, providing for government appeal to the courts of appeals in circumstances such as this, applies only to cases begun in the district courts after January 2, 1971. See Reply Memorandum for the United States in *United States* v. *Brewster*, No. 1025, this Term.

paper, letter, writing, print, or other matters of indecent character; * * *

* * * * *

Shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter.

## STATEMENT

In an indictment filed in the United States District Court for the Eastern District of Wisconsin, appellee was charged with knowingly transporting in interstate commerce, by means of a common carrier, various specified copies of obscene materials in violation of 18 U.S.C. 1462. Appellee filed two motions to dismiss the indictment on the ground that Section 1462 is unconstitutional. One motion was based on the absence of a provision in the statute requiring proof of scienter. The other was based on the contention that the statute is overbroad because it prohibits interstate transportation of obscene material for solely personal use in violation of the First and Ninth Amendments to the Constitution.

The district judge dismissed the indictment on October 28, 1970. Relying primarily on this Court's decisions in *Redrup* v. *New York*, 386 U.S. 767, and *Stanley* v. *Georgia*, 394 U.S. 557, it concluded that the government's interest in controlling distribution or possession of obscenity was limited to preventing "pandering * * * or its exposure to children or to unwilling adults" (Appendix A, *infra*, p. 14). Since Section 1462

reaches beyond these situations to transportation for private use, the court ruled that it is unconstitutional on its face (*ibid.*). The court did not consider the scienter issue.

THE QUESTIONS ARE SUBSTANTIAL

This case is another in a series involving the question of the impact of *Stanley* v. *Georgia, supra,* on the federal obscenity laws. See, *e.g., United States* v. *Reidel,* No. 534, this Term, probable jurisdiction noted, October 12, 1970 (18 U.S.C. 1461) and *United States* v. *Thirty-seven (37) Photographs,* No. 133, this Term, probable jurisdiction noted, October 12, 1970 (19 U.S.C. 1305(a)). The decision below not only diminishes the authority of the United States to prohibit the interstate transportation of obscene material by common carrier but also casts doubt on various other federal and state statutes regulating distribution of obscene matter.

1. The views of the United States as to the impact of *Stanley* v. *Georgia, supra,* are fully set forth in our brief in *Thirty-seven (37) Photographs, supra,* and in our Brief as *amicus curiae* in *Byrne* v. *Karalexis,* pending on appeal, No. 83, this Term.[3] In essence, it is our position that *Stanley* held only that the government lacks the power to punish or bar possession of obscene material "in the privacy of a person's own home," 394 U.S. 564. It does not establish, as the court below concluded, an individual right to receive or distribute obscene matter, nor does it impair the validity

[3] We are providing copies of these Briefs to counsel for appellee.

of this Court's holding in *Roth* v. *United States*, 354 U.S. 476, that obscene material is not entitled to any First Amendment protection. Consequently, the decision does not affect the government's power to control distribution and possession of obscene material outside the home—in this case, its interstate transportation by common carrier.[3]

2. Even assuming that the government cannot punish transportation of obscenity for private use, we believe it is indisputable that it validly may prohibit interstate transportation of obscene material which is intended for public distribution and use. That being so, we contend that the district court erred in according standing to appellee to attack the statute on its face as overly broad. It should, instead, have awaited a factual determination of whether appellee intended private use or public distribution of the materials and then assessed the validity of the application of the statute to the materials in question.[4]

Our position on the question of standing to assert invalidity of a statute on grounds of overbreadth is set forth in our Brief in *Thirty-Seven* (*37*) *Photo-*

[3] Several lower federal courts have adopted essentially this interpretation. See *Miller* v. *United States*, 431 F. 2d 655 (C.A. 9), No. 1014, this Term, petition for a writ of certiorari filed November 27, 1970; *United States* v. *Fragus*, 428 F. 2d 1211 (C.A. 5); *United States* v. *Melvin*, 419 F. 2d 136 (C.A. 4); *Gable* v. *Jenkins*, 309 F. Supp. 998 (N.D. Ga.), affirmed, 397 U.S. 592.

[4] With respect to obscenity statutes, this Court has repeatedly approved the approach of determining their validity as applied rather than on their face. *E.g.*, *Ginzburg* v. *United States*, 383 U.S. 463; *Memoirs* v. *Massachusetts*, 383 U.S. 413; *Redrup* v. *New York*, 386 U.S. 767; see Note, *The First Amendment Overbreadth Doctrine*, 83 Harv. L. Rev. 844, 884–887, 921–922 (1970).

*graphs, supra.* Basically, we contend that a statute must have elements of vagueness, as well as overbreadth, before an individual whose conduct could be constitutionally proscribed under a properly drawn statute—here, a person who transports obscene material for non-private purposes—has standing to challenge it on its face. Cf. *Dombrowski* v. *Pfister,* 380 U.S. 479, 490–492; *Thornhill* v. *Alabama,* 310 U.S. 88, 96–98.

It is vagueness and the consequent uncertainty as to the valid reach of a statute that justifies an expansive attitude toward standing. But the statute here is not vague. The distinction between intended private and public use is clear, and, consequently, the two classes to which the statute may apply are distinct. If application to a person who transports obscenity for private purposes is indeed unconstitutional, this defect in the statute can be cured, when such a person raises the issue, by a restrictive interpretation or by excising invalid portions of the statute. See Sedler, *Standing to Assert Constitutional Jus Tertii in the Supreme Court,* 71 Yale L.J. 599 (1962); Note, *The First Amendment Overbreadth Doctrine,* 83 Harv. L. Rev. 844, 907–910 (1970).

The district court, then, acted prematurely in dismissing the indictment for it is entirely possible, depending on the facts, that the statute might validly apply to appellee under any interpretation.[5]

[5] We note that appellee was convicted in the Central District of California of a similar violation involving a bulk shipment of obscenity where the proof clearly indicated that the material was intended for public distribution. See No. 313, *George Joseph Orito* v. *United States,* this Term, pending on petition for a writ of certiorari.

## CONCLUSION

The resolution of the issues in this case may be governed by the decisions in *Reidel, supra,* and *Thirty-Seven (37) Photographs, supra.* It is respectfully submitted that this Court should defer disposition of the present appeal until after resolution of the appeals in those cases. Depending upon the outcome of those cases, the Court might find it appropriate either to note probable jurisdiction herein or to dispose of the instant case summarily.

ERWIN N. GRISWOLD,
*Solicitor General.*
WILL WILSON,
*Assistant Attorney General.*
ROGER A. PAULEY,
ROBERT E. LINDSAY,
*Attorneys.*

JANUARY 1971.

# APPENDIX A

UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF WISCONSIN

No. 70-CR-20

UNITED STATES OF AMERICA, PLAINTIFF,

*v.*

GEORGE JOSEPH ORITO, DEFENDANT

*Decision and Order*

Two motions to dismiss the indictment are now before the court. In both motions, the defendant contends that 18 U.S.C. § 1462 is unconstitutional. One motion is based on the absence of any provision in the statute requiring proof of scienter; the other is based on the defendant's contention that the statue is overbroad and violates the first and ninth amendments in imposing criminal sanctions for the interstate transportation of obscene material which may be designed for personal use.

The defendant was charged in a one-count indictment which alleges that he knowingly transported in interstate commerce, by means of a common carrier, certain "copies of obscene, lewd, lascivious, and filthy materials".

The court must decide whether *Stanley* v. *Georgia,* 394 U.S. 537 (1969) and *Redrup* v. *New York,* 386 U.S. 767 (1967) render § 1462 unconstitutional because such section proscribes all transportation of ob-

scene materials without discriminating as to whether such materials are "pandered", exposed to children or imposed on unwilling adults.

The defendant urges that under *Stanley* the transportation and receipt of obscene matter for private use is constitutionally protected, and that only certain types of public distribution of obscene matter, as described in *Redrup,* may be subjected to governmental control. The United States, on the other hand, urges that *Stanley* did not purport to modify *Roth* v. *United States,* 354 U.S. 476 (1957) and that, on its limited facts, *Stanley* permits an individual to possess obscene materials in his own home, but it does not grant one a protected right to transport or receive such materials.

In its per curiam opinion in *Redrup* v. *New York,* 386 U.S. 767 (1967), the court observed that in none of the cases which were then before the court ". . . was there any suggestion of an assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it." (p. 769).

Two courts of appeal have decided cases which tend to support the government's position. In *United States* v. *Melvin,* 419 F. 2d 136 (4th Cir. 1969), the court concluded that notwithstanding Stanley, "Congress has the power to forbid interstate transportation of obscenity." (p. 139). Also, in *United States* v. *Fragus,* 428 F. 2d 1211 (5th Cir. 1970), the court rejected a proposed expansion of *Stanley.*

A three-judge court convened in the northern district of Georgia decided "to keep Stanley limited to its facts". *Gable* v. *Jenkins,* 309 F. Supp. 998, 1000 (N.D. Ga. 1969). This case was summarily affirmed at 397 U.S. 592 (1970).

There are a number of cases in which the rationale of *Stanley* has been construed more broadly than the three decisions referred to immediately above. Thus, in *Stein* v. *Batchelor*, 300 F. Supp. 602 (N.D. Tex. 1969), *probable jurisdiction noted sub nom., Dyson* v. *Stein*, 396 U.S. 954 (1969), *restored to calendar for reargument*, 399 U.S. 922 (1970), a three-judge court asserted that it was "impossible" for the court to ignore the broader implications of the opinion which appears to reject or significantly modify the proposition stated in Roth v. United States . . ." The court went on to say (p. 606):

> *Stanley* expressly holds that obscenity is protected in the context of mere private possession and in our opinion further suggests that obscenity is deprived of this protection only in the context of "public action taken or intended to be taken with respect to obscene matter".

The court in *Stein* concluded that the Texas obscenity statute "as a whole is overbroad in that it fails to confine its application to a context of public or commercial dissemination." (p. 607).

Another court which considered the impact of *Stanley* is *Karalexis* v. *Byrne*, 306 F. Supp. 1363 (D. Mass.) (1969), *probable jurisdiction noted*, 397 U.S. 985 (1970), *restored to calendar for reargument* 399 U.S. 922 (1970). In that case, a three-judge district court reviewed an obscenity statute which prohibited importing, printing, distributing or possessing obscene matter. The court expressed its conclusion "that public distribution differed from private consumption" and that this distinction also applied to transportation. The court said, at p. 1366:

> . . . We think it probable that *Roth* remains intact only with respect to public distribution in the full sense, and that restricted distribution,

adequately controlled, is no longer to be condemned.

Another recent decision in which the court dismissed counts charging the transportation of obscene material is *United States* v. *Lethe*, 312 F. Supp. 421 (E.D. Cal. 1970). There the court pointed to the absence of any legitimate governmental interest to justify regulation. Said the court (p. 425):

> The Supreme Court has recognized the protection of children and the protection of an unwilling public from obtrusive invasions of privacy as proper governmental interest justifying obscenity laws. But neither of these can be used to justify prohibiting mailings to a requesting adult. There is no public display, and children are not involved. No valid governmental interest remains, and the conclusion is inescapable that the government cannot constitutionally bring such a prosecution.

Another case in which a three-judge district court determined the breadth of *Stanley* is *United States* v. *Thirty-Seven (37) Photographs*, 309 F. Supp. 36 (C.D. Calif. 1970). The United States Supreme Court has recently accepted this case for review. See 39 L.W. 3131. In *Thirty-Seven (37) Photographs*, the court invalidated 18 U.S.C. § 1305, stating (p. 37):

> It prohibits an adult from importing an obscene book or picture for private reading or viewing, an activity which is constitutionally protected. As stated in *Stanley*, the right to read necessarily protects the right to receive.

In *Lethe*, cited above, the court discussed the relationship of the right to possess and the right to receive in these terms (p. 424):

> If the government has no substantial interest in preventing a citizen from reading books and

watching films in the privacy of his home, then clearly it can have no greater interest in preventing him from acquiring them.

In *Griswold v. Connecticut,* 381 U.S. 479 (1965), the court noted that since married couples have the right to use contraceptive devices, such right would be meaningless if a state could lawfully block such persons from receiving contraceptive devices and instruction. By analogy, it follows that with the right to read obscene matters comes the right to transport or to receive such material when done in a fashion that does not pander it or impose it upon unwilling adults or upon minors.

Although this opinion has concerned itself primarily with *Stanley* and *Redrup* and the cases subsequent thereto which have attempted to apply those decisions, there are a number of other decisions which adopt an obtrusiveness approach. For example, as far back as the year 1948, in *Winters* v. *New York,* 333 U.S. 507, 515 (1948), the court spoke of "gross and open indecency or obscenity". The pandering theory, adopted in *Ginzburg* v. *United States,* 383 U.S. 463 (1966), would appear to be bottomed on the concept that brazen and public promotion of prurient material deprives it of its first amendment protection. In a dissenting opinion in *Ginzburg,* Justice Stewart spoke of (p. 498, Note 1):

> . . . an assault upon individual privacy by publication in a manner so blatant or obtrusive as to make it difficult or impossible for an unwilling individual to avoid exposure to it.

I am unable to accept the narrow interpretation of *Stanley* which the government would ascribe to it. I find more reasonable and impressive the analysis and interpretation adopted by the courts in *Stein* v.

*Batchelor, Karalexis* v. *Byrne, United States* v. *Lethe,* and *United States* v. *Thirty-Seven* (*37*) *Photographs.* I find no meaningful distinction between the private possession which was held to be protected in *Stanley* and the non-public transportation which the statute at bar proscribes.

To prevent the pandering of obscene materials or its exposure to children or to unwilling adults, the government has a substantial and valid interest to bar the non-private transportation of such materials. However, the statute which is now before the court does not so delimit the government's prerogatives; on its face, it forbids the transportation of obscene materials. Thus, it applies to non-public transportation in the absence of a special governmental interest. The statute is thus overbroad, in violation of the first and ninth amendments, and is therefore unconstitutional.

In view of the court's conclusion as stated above, the question whether scienter is an essential element of the offense need not be determined by the court.

Now, therefore, IT IS ORDERED that the defendant's motion to dismiss the indictment on the ground that 18 U.S.C. § 1462 is unconstitutional for its violation of the first and ninth amendments of the United States Constitution be and hereby is granted.

Dated at Milwaukee, Wisconsin, this 28th day of October, 1970.

MYRON L. GORDON,
*United States District Judge.*

# APPENDIX B

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF WISCONSIN

Case No. 70-CR-20

UNITED STATES OF AMERICA, PLAINTIFF

*vs.*

GEORGE JOSEPH ORITO, DEFENDANT

*Notice of Appeal*

NOTICE IS HEREBY GIVEN that the Plaintiff, United States of America, hereby appeals to the Supreme Court of the United States pursuant to Section 3731, Title 18, United States Code, from the order of the District Court dismissing the instant Indictment on the ground that 18 U.S.C. 1462 is unconstitutional for its violation of the First and Ninth Amendments of the United States Constitution.

Dated at Milwaukee, Wisconsin, this 29th day of October, 1970.

/s/ DAVID J. CANNON,
*United States Attorney.*



U.S. GOVERNMENT PRINTING OFFICE: 1971